Filed 2/16/05 In re L.S. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re L. S. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Respondent, v. JOHN C., Defendant and Appellant.	E036452 (Super.Ct.Nos. J-194426, J-194427 & J-194428) OPINION

APPEAL from the Superior Court of San Bernardino County. Raymond L. Haight III, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Ronald D. Reitz, County Counsel, and Julie J. Surber, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer Mack, under appointment by the Court of Appeal, for Minors.

In this dependency appeal, John C. (Father), presumed father of D. S. and L. S., contends the San Bernardino County Department of Children's Services (the Department) failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) by omitting relevant and known information regarding the children's family ancestry from the notice provided to three Cherokee Indian tribes and the Bureau of Indian Affairs.

PROCEDURAL BACKGROUND AND FACTS

On April 9, 2004, the Department received a referral from the Child Abuse Hotline regarding the children. Scarlett S. (Mother) was arrested for multiple felony warrants and methamphetamine was found in the home. She had a long history of using controlled substances including crack cocaine, methamphetamine and marijuana. She had had her parental rights as to four other children previously terminated. Father was incarcerated at the Glen Helen Rehabilitation Center. The couple had a history of domestic violence.

On April 13, 2004, the Department filed petitions under Welfare and Institutions Code section 300, subdivisions (b), (g), and (j)[1] on behalf of J. C. (born 2000) and the twins L. S. and D. S. (born 2003). The petitions alleged the children were at risk due to both parent's histories of drug use and domestic violence, and Mother's history of

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

neglect. On April 14, the children were detained and placed in a confidential foster home.

Prior to the jurisdiction hearing, Mother informed the social worker that she thought she had some Cherokee ancestry. The social worker conducted telephone interviews with numerous relatives, including the maternal great-aunt and uncle (Homer and Ruby S.) who lived in Indiana, and reported the relatives "had done extensive research into the Indian heritage." After the interviews, the social worker prepared an Indian Child SOC 820 form titled "Notice of Child custody Proceedings for an Indian Child." The form listed the names, birthdates, and birth places for the children, Father, Mother, and maternal great-great-aunt, and that the children were reported to be affiliated with a Cherokee tribe. In May, the social worker mailed ICWA notice containing the Indian Child SOC 820 form to the Eastern Band of Cherokee Indians, the United Keetoowah Band, the Cherokee Nation of Oklahoma, and the Bureau of Indian Affairs (BIA).

On May 24, 2004, the Eastern Band of Cherokee Indians responded with a letter indicating the children were not Indian children. However, the letter also included a disclaimer which stated that the determination "**is based on the information exactly as provided by you. Any incorrect or omitted family documentation could invalidate this determination**."

On June 8, 2004, the United Keetoowah Band responded and stated that according to the information supplied, the children were not decedents from anyone on the Keetoowah roll.

The BIA also responded by stating "[t]he family ha[d] provided insufficient information substantiating any federally recognized tribe. The family must provide a history back to the year 1900 with names, birth dates and/or birthplaces of ancestors to help in establishing a **biological** link with the original ancestral tribal member(s)." The letter further stated: "We depend on the family's information and the investigation conducted by the [Department] to help us identify tribal heritage so that the appropriate tribe and/or rancheria can be notified. **This form is not [to] be considered a determination that the child(ren) is or is not an Indian Child under the ICWA. Notice to the Bureau of Indian Affairs is not a substitute for serving notice on the identified federally recognized tribe and the parent or Indian custodian. Compliance with 25 USC 1912 and Rule 1439 is still required**."

Before the jurisdictional hearing, the social worker submitted an addendum report which documented her efforts to comply with the notice requirements of the ICWA, and contained copies of the responses received from the tribes and the BIA. Attached to the report were the SOC 820 notices sent to the tribes, certified mail receipts and the response letters.

The contested jurisdiction hearing was held on June 15, 2004. The social worker testified at the hearing. She opined that it was not possible that ICWA applied; however, she was still awaiting the response of one tribe. The court found that the children came within the provisions of section 300, subdivisions (b) and (j), and that ICWA may apply.

On August 3, 2004, during a disposition hearing, the court noted the receipt of the social worker's report which documented her compliance with the ICWA notice

requirements. The court then found that the ICWA notice requirements had been satisfied. Father was found to be the presumed father of the children and was provided with six months of reunification services. Father appeals from the court's jurisdiction/disposition order.

ICWA

"The ICWA (25 U.S.C. § 1901 et seq.) was enacted in 1978, out of an increasing concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of child welfare practices that separated large numbers of Indian children from their families and tribes, and placed them in non-Indian homes through state adoption, foster care, and parental rights termination proceedings. [Citation.] . . .

"The stated purpose of the ICWA is to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster care or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.' [Citation.] . . .

"Title I of the ICWA applies to child custody proceedings [citation] that involve an Indian child. [Citation.] 'Indian child' is defined in the Act as 'any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.' [Citation.] The ICWA defines an Indian child's tribe as (a) an Indian tribe in which an Indian child is a member or eligible for membership, or (b) in the case of an

Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts. [Citation.] Each Indian tribe has sole authority to determine its membership criteria, and to decide who meets those criteria. [Citation.] . . .

"If, in an involuntary child custody proceeding, probable cause exists to believe that the proceeding involves an Indian child within the meaning of the Act, the Indian child's tribe must be notified of the pendency of the action, and of its right to intervene. [Citation.] 'In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Department of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe.' [Citation.] Actual notice to the tribe has been found sufficient, notwithstanding failure to serve notice by registered mail. [Citation.] An Indian child's tribe may intervene at any point in the proceedings. [Citation.]

". . . . . .

"Rule 1439 of the California Rules of Court implements the ICWA for California courts. Rule 1439 incorporates the ICWA definitions of Indian child, Indian child's tribe, and Indian tribe without modification [citation] and provides that the ICWA applies when

a tribe determines that an unmarried minor is: (A) a member of an Indian tribe; or (B) eligible for membership in an Indian tribe and a biological child of a tribe member. [Citation.]" (*In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1299-1302, fns. omitted.)

DISCUSSION

Father contends the juvenile court erred in finding that the Department had complied with the notice requirements pursuant to ICWA. He argues that the Department's "notice omitted significant family identifying information, including, but not limited to, the names of the maternal grandparents." While the children's counsel agrees with Father, the Department responds that "there was no information in the record that the social worker was provided any information that was not provided on the ICWA notices." We agree with the Department.

"To satisfy the notice provisions of [ICWA] and to provide a proper record for the juvenile court and appellate courts, [the Department] should follow a two-step procedure. First, it should identify any possible tribal affiliations and send proper notice to those entities, return receipt requested. (Rule 1439(f).) Second, [the Department] should provide to the juvenile court a copy of the notice sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the [child's] status. If the identity or location of the tribe cannot be determined, the same procedure should be used with respect to the notice to BIA." (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 733, 739-740, fn. 4.) The juvenile court is responsible for reviewing the information concerning the notice given, the timing of the notice, and the response of the tribe, so that it may make a determination as to the applicability of ICWA, and, if applicable, comply

with all of its provisions. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 261.)

The following information, if known, is to be included in the ICWA notice: (a) the name of the Indian child, the child's birthdate and birthplace; (b) the name of the Indian tribe(s) in which the child is enrolled or may be eligible for enrollment; (c) all names known, and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information; and (d) a copy of the petition, complaint or other document by which the proceeding was initiated. (25 C.F.R. § 23.11(d) (2004).)

Here, the Department satisfied its duty of inquiring into whether the children might be Indian children. (*In re D. T.* (2003) 113 Cal.App.4th 1449, 1455; Cal. Rules of Court, rule 1439(d).) The social worker conducted interviews with Mother's relatives in Indiana who "had done extensive research into the Indian heritage." The information obtained from these interviews was included in the forms provided to the BIA and the three tribes affiliated with Cherokee heritage. Although Father claims that there was more information which was known to the social worker by virtue of her interviews with Mother's relatives, he has offered no evidence of what that information is. Nor do we find anything in the record to suggest that the social worker possessed information which was not provided in the ICWA notices. Given the state of the record before us, we find that Father's claim is, at best, speculative.

The case law which Father cites in support of his claim is distinguishable. In *In re C.D.* (2003) 110 Cal.App.4th 214, the social services agency failed to provide the BIA with the name of the paternal grandfather even though the father had given it to the agency and stated that his grandfather was of Blackfeet heritage. (*Id.* at p. 219.) During the appeal, the agency corrected this failure by providing notice, including the name of the paternal grandfather and great-grandfather, to the Blackfeet Tribe. (*Id.* at p. 224.) Although the agency cured the notice problem, the appellate court would not dismiss the case as moot because it perceived a problem with forms SOC 319 and SOC 318 which failed to include spaces for the current or former addresses of any of a child's relatives. (*Id.* at pp. 225-226.) In analyzing these forms, the appellate court held that "notice to a tribe under the ICWA must include not only the information provided in connection with form SOC 319, but also the information set forth in the BIA Guidelines at 25 Code of Federal Regulations part 23.11(d)(3), if such information is known, including the name of a child's grandparents. . . . [F]orm SOC 319 fails to provide sufficient notice of dependency proceedings to a tribe under the ICWA when an agency knows additional information about a child's family history, such as the names of the grandparents. The agency . . . has a duty to inquire about and obtain, if possible, all of the information about a child's family history included on form SOC 319 and in 25 Code of Federal Regulations part 23.11(d)(3)." (*In re C.D.*, *supra*, 110 Cal.App.4th 214, 225, fn. omitted.)

Unlike the facts in *In re C.D.*, in this case there is no evidence that the social worker had information about the children's relatives which she failed to include in the

notices sent to the BIA and the three tribes affiliated with Cherokee heritage. Accordingly, we reject Father's claim that the trial court erred in finding that the Department had complied with the notice requirements of the ICWA.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

WARD
J.